No. 07-3885

UNITED STATES COURT of APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTIONAL STATEMENT

The jurisdictional statement of United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("the Union") is complete and correct.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the striker replacements hired by the Company were permanent replacements and that the Company therefore did not violate Section 8(a)(3) and (1) of the Act by failing to reinstate economic strikers immediately upon their unconditional offer to return to work.

STATEMENT OF THE CASE

On an unfair labor practice charge filed by the Union,[1] the General Counsel of the National Labor Relations Board ("the Board") issued a complaint alleging that Jones Plastic & Engineering Company (Camden Division) ("the Company") had violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(3) and (1)) ("the Act"), by failing to reinstate 46 named strikers immediately upon their unconditional offer to return to work.

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[1] The charge named "United Steelworkers of America, AFL-CIO, CLC" as the charging party. (JA 20.) The Union notes (Br. 1 n.1) that it was formed by the subsequent merger of the United Steelworkers and another international union. The term "the Union" will be used in this brief to refer both to the United Steelworkers and to the entity resulting from the merger.

(JA 22-26.)[2] The Company filed an answer asserting, as an affirmative defense, that it had permanently replaced the strikers. (JA 28-29.) The parties filed a joint motion to transfer the proceeding to the Board, a stipulation of facts, and a waiver of the right to a hearing before, and a decision by, an administrative law judge. The Board's Executive Secretary issued an order approving the stipulation and transferring the case to the Board. (JA 4 n.1, 14-19.)

The Board (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh dissenting) found, on the stipulated record, that the striker replacements hired by the Company were permanent replacements and that the Company therefore was not required to dismiss them to make way for returning strikers. Accordingly, the Board found that the failure immediately to reinstate the strikers did not violate the Act, and dismissed the complaint. (JA 4-13.) The Union filed a petition for review in this Court.[3]

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[2] "JA" references are to the "Joint Circuit Rule 30(a)(b) Appendix" attached to the Union's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] The AFL-CIO, which filed an amicus brief before the Board, has also filed an amicus brief in this Court. LABNET, Inc., d/b/a Worklaw Network, had filed an amicus brief before the Board, but has not appeared before this Court.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

The Company is engaged in the manufacture of plastic injection molded parts in Camden, Tennessee. On April 24, 2001, the Union was certified as the exclusive bargaining representative of the production and maintenance employees at the Camden facility. The parties negotiated for a collective-bargaining contract, but failed to reach agreement. On March 20, 2002, about 53 of the 75 bargaining unit employees began an economic strike. (JA 4; 15-16.)

On April 5, 2002, the Company sent each striking employee a letter, saying that it had begun to hire permanent replacements for the strikers and that any striker who did not immediately return to work risked being permanently replaced. (JA 5; 17, 41.) By July 31, 2002, the Company had hired a replacement for each of the 53 striking employees. Each of these 53 replacements signed a form reading as follows:

> I (name of replacement employee) hereby accept employment with Jones Plastic & Engineering Company, LLC, Camden division (hereafter "Jones Plastic") as a permanent replacement for (name of striker) who is presently on strike against Jones Plastic. *I understand that my employment with Jones Plastic may be terminated by myself or by Jones Plastic at any time, with or without cause.* I further understand that my employment may be terminated as a result of a strike settlement agreement reached between Jones Plastic and the U.S.W.A. Local Union 224 or by order of the National Labor Relations Board.

(JA 5; 16, 40 (emphasis added).)

Also prior to July 31, 2002, the Company hired 33 additional employees to replace striker replacements who had left its employ. These 33 employees signed a form identical to the one signed by the original replacements, except that it stated that the signer was a permanent replacement for "a striker" who was not named. (JA 5; 17, 42.)

The Company's Human Resource Manager, Sylvia Page, informed one striker replacement that he was a full-time and permanent employee. Page informed another replacement that she was a full-time employee, and that replacement received the same pay and benefits previously received by striking employees. (JA 5; 17.)

On July 31, 2002, the Union made an unconditional offer to return to work on behalf of all the striking employees. The Company, on the same day, sent the Union a letter stating that it had a full complement of employees, including permanent replacements. Therefore, the letter stated, the strikers would not be immediately reinstated, but would be placed on a preferential recall list. (JA 5; 18, 43-45.) Between September 5 and September 19, the Company offered

reinstatement to 46 strikers, of whom only 18 accepted the offers. (JA 5; 18, 46-47.)[4]

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (Chairman Battista and Members Schaumber and Kirsanow; Members Liebman and Walsh dissenting) found, on the foregoing facts, that the Company's use of forms stating that the striker replacements were permanent replacements, its oral statement to one replacement that he was permanent, and its notice to the strikers that it was hiring permanent replacements were sufficient, standing alone, to show that the Company had hired permanent, not temporary, replacements. (JA 7.) The Board further found that neither the Company's at-will employment disclaimers nor any other evidence detracted from the striker replacements' permanent status. (JA 10.)[5] Accordingly, the Board found that the Company had met its burden of proving that the replacements were permanent and

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[4] Six strikers were not offered reinstatement, and were later discharged, because of strike misconduct. A charge alleging that their discharges were unlawful was dismissed by the Board's General Counsel. (JA 5 n.3; 18-19, 46-49.) Those discharges are not in issue here. A seventh striker (Oliver Leath) returned to work before the strike was over (JA 46) and is not among the 46 alleged discriminatees (JA 24-25).

[5] The Board overruled *Target Rock Corp.*, 324 NLRB 373 (1997), insofar as it implied that at-will employment is necessarily inconsistent with, or detracts from, an otherwise valid showing of permanent replacement status. (JA 10.)

therefore did not violate the Act by delaying reinstatement of the strikers. The Board thus dismissed the complaint.[6]

SUMMARY OF ARGUMENT

The Board reasonably found that the "at-will" language in the forms signed by striker replacements did not negate the other evidence indicating that the replacements were permanent.

1. "At-will" employment is consistent with the dictionary definition of "permanent," which connotes a status intended to last indefinitely. In contrast, "temporary" connotes a status which is to last only for a specified period or until the occurrence of a specific anticipated event.

2. The Supreme Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), is not to the contrary. The issue in *Belknap* was not what constitutes permanent replacement, but whether federal law preempts damage suits brought by concededly permanent replacements who were dismissed to make room for returning economic strikers. *Belknap* did not purport to overturn longstanding

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[6] Members Liebman and Walsh, dissenting, were of the view that the reference to at-will employment, while not fatal to a claim of permanent replacement status, rendered ambiguous the statements to the replacements that they were permanent, and that there was no other evidence of a mutual understanding between the Company and the replacements that the latter were permanent. (JA 13 & nn.12, 13.)

Board precedent that supports the Board's decision here. For instance, the Board has held that replacements hired on a probationary basis who could be discharged at will during the probationary period were nevertheless permanent. Moreover, here, as in the cases involving probationary employees, the Company was merely following its established practice in hiring the replacements on an "at-will" basis. To depart from that practice would have given the replacements an unlawful preference over strikers who were hired as "at-will" employees.

3. A finding that replacements are permanent does not require a showing that an enforceable contract exists between the replacements and the employer. The Board and lower courts, including this Court, have required a mutual understanding between the employer and the replacements that the latter are permanent, but have never required that the understanding take any specific form, and have always focused solely on the existence of an understanding, not on its enforceability under state law. Nothing in *Belknap* rejects this approach. Moreover, requiring an enforceable contract would preclude the establishment of a uniform national definition of "permanent" replacement, since the requirements for enforceability of an employment contract are determined by state, rather than federal law, and vary in different states.

4. *Belknap* held that an employment contract conditioned on possible dismissal of the replacement in favor of a striker pursuant to a Board order or a

settlement agreement between the employer and the union would not make the replacement temporary. It did not hold that the imposition of any other conditions on the replacement's tenure would automatically make him temporary, but recognized that all hirings are to some extent conditional. The "at-will" language in the Company's employment forms, like the conditions approved by the Supreme Court in *Belknap*, merely informed the replacements of their legal status. It did not render the promise of permanent employment illusory because it left the Company free to terminate the replacements in favor of returning strikers. An employer's decision to enter into a strike settlement agreement requiring such termination is no less within his control, but, under *Belknap*, the possibility that the employer may make that decision does not make the replacement a temporary employee under the Act.

5. The Board properly rejected the Union's contention that an employer offering to employ replacements on an "at-will" basis should be required expressly to disclaim intent to terminate them to make room for returning strikers. Such a requirement would be contrary to longstanding Board precedent holding that no particular "magic words" are necessary to make a replacement permanent under the Act. Moreover, such a disclaimer, which would qualify the "at-will" language and would itself be qualified by language stating that the replacement could be terminated in favor of a returning striker pursuant to a Board order or strike

settlement agreement, would make the whole employment form too confusing and ambiguous to establish the mutual understanding of permanent status required by Board law.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE STRIKER REPLACEMENTS WERE PERMANENT REPLACEMENTS AND THAT THE COMPANY THEREFORE DID NOT VIOLATE SECTION 8(a)(3) AND (1) OF THE ACT BY FAILING TO REINSTATE ECONOMIC STRIKERS IMMEDIATELY UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Applicable Principles and Standard of Review

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of their statutory rights. Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization."

It is well settled that an economic striker retains his status as an "employee" under Section 2(3) of the Act (29 U.S.C. § 152(3)). An employer therefore violates Section 8(a)(3) and (1) by failing to reinstate such a striker upon his unconditional offer to return to work, unless the employer shows a "'legitimate and substantial business justification'" for the failure to reinstate. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (citation omitted). *Accord NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 572 (7th Cir. 1980) ("*Mars Sales*").

It has been recognized since the early days of the Act that a legitimate business justification for not immediately reinstating economic strikers exists when the employer has hired permanent replacements for the strikers. *See Fleetwood Trailer Co.*, 389 U.S. at 379; *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) ("*Mackay*"); *Mars Sales*, 626 F.2d at 572.[7] Where such replacements remain employed at the end of the strike, the employer need not discharge them to make way for the strikers. It may postpone reinstatement of the strikers until positions become available for which they are qualified. *See Mackay*, 304 U.S. at 345-46, 347; *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 104 (7th Cir. 1969) (*"Laidlaw"*).[8]

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[7] This business justification is insufficient where (as is concededly not the case here) the strike is an unfair labor practice strike. In such cases, the replacements must be discharged if necessary to bring about full reinstatement of the strikers. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 493 (1983); *Richmond Recording Corp. v. NLRB*, 836 F.2d 289, 294 (7th Cir. 1987).

[8] Once such vacancies occur, the prior hiring of replacements is no longer a valid reason for refusing to reinstate the strikers, and the vacant positions must be offered to them, absent some other legitimate business justification for not doing so. *See Laidlaw*, 414 F.2d at 103, 105.

There is no contention here that the Company failed to fulfill its obligations under *Laidlaw*. It placed all of the strikers (except those lawfully discharged for strike misconduct) on a preferential recall list as soon as they unconditionally offered to return to work (JA 18, 44), and it offered reinstatement to all the strikers on that list within 7 weeks thereafter. (JA 18, 46-47.)

The burden is on the employer to prove that any replacements it hired were, in fact, permanent. *See NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1473 (7th Cir. 1992). The employer must show that it "had a 'mutual understanding' with the replacements that they were permanent." *Id*. (citations omitted).

Whether a mutual understanding of permanent status existed is a factual question on which, under Section 10(e) of the Act, the Board's findings are conclusive if supported by substantial evidence on the record as a whole. *See Augusta Bakery Corp.*, 957 F.2d at 1473-74. This standard is met if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). A Board determination that the General Counsel has failed to prove a violation of the Act "'must be upheld unless the determination has no rational basis in the record.'" *Kankakee-Iroquois County Employers' Assn. v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987) (citations omitted).

The Board's construction of the Act is to be upheld if it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979). Since the Act does not define, or even mention, the term "permanent replacement," courts may not substitute their interpretation of the term for the Board's reasonable interpretation. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99, 409 (1996). Rather, "the Board's legal conclusions should be accepted . . . unless they are

irrational or inconsistent with the Act." *Jones Dairy Farm v. NLRB*, 909 F.2d 1021, 1027 (7th Cir. 1990).

B. The Striker Replacements Were Permanent

It is undisputed that the strike in this case was purely economic in nature. Moreover, there is no contention that union animus contributed to the delay of a few weeks in reinstating the strikers after their unconditional offer to return to work. Accordingly, if the striker replacements were permanent, the failure immediately to reinstate the strikers was lawful. As shown below, the Board was warranted in finding the replacements to be permanent.

1. Permanent status does not require an enforceable employment contract

In finding the replacements to be permanent, the Board relied (JA 7) on the following affirmative evidence: The forms that the replacements signed stated that they were permanent replacements for striking employees who, in some cases, were named; the Company told the striking employees that it was hiring permanent replacements for them; and the Company's human resource manager told one replacement that he was a permanent employee. Neither the Union nor amicus AFL-CIO disputes the Board's conclusion (JA 7) that the foregoing evidence, standing alone, would be sufficient to make the replacements permanent. They do, however, challenge the Board's further conclusion (JA 10) that there was no evidence detracting from this showing, contending (Union Br. 22-28, 30-31;

AFL-CIO Br. 7) that the statements on the forms signed by the replacements that the Company could terminate their employment at any time for any reason negated the promise of permanent status made in the previous sentence on the forms. The Board properly rejected this contention.

The term "permanent" means "lasting or meant to last indefinitely." *Webster's II New Riverside University Dictionary* at 875 (1994). "At-will" employment is consistent with this definition. *See Auto Workers Local 737 v. Auto Glass Employees Federal Credit Union*, 72 F.3d 1243, 1251 (6th Cir. 1996) (under law of Tennessee, where this case arose, employment for an indefinite term is presumptively "at-will" employment). In contrast, "temporary" denotes a status which will continue only for a specified period of time or until the occurrence of a specific event which is expected to occur in the near future – for example, employment only for the duration of a strike. Thus, under the Act, "permanent" employment requires only a commitment to employ indefinitely, not a contract promising never-ending employment.

However, the Union (Br. 13-31) and the AFL-CIO (Br. 5, 7-10) assert that the Supreme Court's decision in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) ("*Belknap*"), compels a far narrower definition of "permanent" in the striker replacement context: that a replacement is permanent only if he or she has a legally

enforceable agreement with the employer to that effect. This contention is without merit.

The issue in *Belknap*, as described by the Supreme Court, was not what the employer must do to give a replacement permanent status, but "whether the . . . Act . . . pre-empts a misrepresentation and breach-of-contract action against the employer brought in state court by . . . replacements who were displaced by reinstated strikers after having been offered and accepted jobs on a permanent basis . . . ." 463 U.S. at 493. The permanent status of the replacements was not in dispute, nor could it be. The employer had advertised in the newspaper for "QUALIFIED PERSONS LOOKING FOR EMPLOYMENT TO PERMANENTLY REPLACE STRIKING . . . EMPLOYEES." *Id.* at 494 n.1. Each of the replacements had signed a form stating that he was a permanent replacement for a named striker. *Id*. at 494-95. Moreover, the employer, after the filing of unfair labor practice charges against it, [9] told the replacements in a letter that "you will continue to be permanent replacement employees so long as you conduct yourself in accordance with the practices and policies that are in effect

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[9] These charges, if sustained, would have made the strike an unfair labor practice strike and precluded retention of the replacements when the strikers sought to return to work. See above, p. 12 n.7.

here . . .", and "we have made it clear to the Union that we have no intention of getting rid of the permanent replacement employees just . . . to provide jobs for the replaced strikers . . . ." *Id*. at 495.

However, the employer later entered into a settlement agreement with the union and the Board's Regional Director whereby it agreed to recall a specific number of strikers each week. To make room for the strikers, the employer laid off some of the replacements. *Id.* at 496. The replacements brought suit in state court, alleging misrepresentation and breach of contract. The Supreme Court did not inquire into whether, as a matter of state law, the replacements could prove all the elements of either cause of action, but held that federal law did not preempt a suit on either ground. *Id.* at 499-512.

As the Board noted here (JA 8), whether "at-will" employment was inherently inconsistent with permanent status was an issue not presented in *Belknap*. It is therefore unlikely that the Supreme Court chose the case as a vehicle for overturning longstanding Board precedent on the issue. The Board had thrice previously held that striker replacements who had not yet completed a probationary period and could therefore be discharged at will were nevertheless permanent replacements who did not have to be discharged to make room for strikers. *See C. H. Guenther & Son, Inc.*, 174 NLRB 1202, 1212 (1969), *enforced*, 437 F.2d 983, 985-86 (5th Cir. 1970); *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 (1958);

Kansas Milling Co., 97 NLRB 219, 225-26 (1951). For example, in *Anderson, Clayton & Co.*, 120 NLRB at 1214, the employer "required a 6-month probationary period for all new employees during which it was free to discharge . . . an employee without recourse on his part." Similarly, in this case, the Company's handbook stated, "[e]mployees are hired on a training period." (JA 38.) Nothing in *Belknap* suggests, as the Union does (Br. 23 n.9), that the foregoing cases are no longer good law and that an employer who wishes to hire permanent replacements for strikers cannot subject them to at-will discharge during a probationary period.

The Board also stressed here (JA 9), as it had in *Kansas Milling*, 97 NLRB at 226, and *Solar Turbines*, 302 NLRB 14, 15 (1991) (a post-*Belknap* decision which reaffirmed *Kansas Millin*g and its progeny), that the Company, in advising the replacements of their "at-will" status, was simply following its normal employment practices, as set forth in its employee handbook. (JA 38.) The Union's position would require an employer who normally hired employees at will to depart from its routine practice if it wished to hire permanent replacements. As the Board pointed out (JA 9), this would give the replacements an unwarranted preference over the strikers, who presumably were hired as "at-will" employees and remained "at-will" employees when the strike began. Such a preference would itself be unlawful under *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230-31

(1963), inasmuch as it would work to the detriment of all strikers, whether replaced or not, and that detriment would continue even after all strikers had been reinstated.

The Board (JA 7, 9-10) overruled its prior decision in *Target Rock Corp*., 324 NLRB 373 (1997), to the extent that it suggested that "at-will" employment, without more, is incompatible with permanent status for striker replacements. In *Target Rock*, unlike this case, there was ample additional evidence that the replacements were not permanent. The advertisements to which most of the replacements responded said only that their hiring "*could* lead to permanent full-time [jobs] after the strike" (324 NLRB at 373 (emphasis added)); the application forms signed by the replacements made no mention of permanent employment (*id.* at 374); the employer repeatedly told the union during contract negotiations that if the strikers made an unconditional offer to return to work, they would be reinstated and the replacements terminated (*id*.); and the replacements were told when they were hired and again when they inquired about their status several months later that they would be considered "permanent at-will employees unless the . . . Board considers you otherwise," without requiring that the Board find the strike to be an unfair labor practice strike (*id*.). *Target Rock* did not cite or attempt to distinguish the prior decisions discussed above, pp. 17-18. Thus, insofar as it could be read as holding that "at-will" language precludes a finding of permanent replacement, the

Board (JA 9) properly rejected it as an unexplained departure from prior precedent. *Cf. NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280, 284 (7th Cir. 1986) (unexplained failure to follow prior precedent held reversible error).

To bolster its claim that at-will employment results automatically in temporary status, the Union relies (Br. 18-19, 22) on the citation in *Belknap*, 463 U.S. at 505 n.8, of *Covington Furniture Mfg. Corp.*, 212 NLRB 214 (1974), *enforced*, 514 F.2d 995 (6th Cir. 1975). *Belknap* described *Covington* as a case where "the replacements could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if it discharged some of them to make way for returning strikers . . . ." An examination of *Covington* reveals that the decision there turned on the "absence of *any* promise . . . to the replacements that they were permanent replacements." 214 NLRB at 220 (emphasis added). In addition, the employer in *Covington* often hired *two* replacements as trainees for each job and dropped the poorer one shortly thereafter (*id.*), a procedure providing for less job security for any given replacement than if he were the sole replacement for a named striker, as was the case here. The Board's decision nowhere indicated that the replacements were told that they were "at-will" employees or relied on any inference that they were. Accordingly, in context, the statement that "the employer's hiring offer must

include a commitment that the replacement position is permanent" (214 NLRB at 220) cannot be read as requiring that the commitment be in any particular form.

Board and lower court decisions, both before and after *Belknap*, have likewise not required the commitment to the replacement to take any particular form. The Board requires "a *mutual* understanding between [the employer] and the replacements that they are permanent." *Hansen Bros. Enterprises*, 279 NLRB 741, 741 (1986), *enforced mem.*, 812 F.2d 1443 (D.C. Cir. 1987). However, the Board does not require the use of the specific word "permanent" or any other "magic words" to establish such an understanding. *See Crown Beer Distributors, Inc.*, 296 NLRB 541, 549 (1989); *accord Gibson Greetings, Inc. v. NLRB*, 53 F.3d 285, 390 (D.C. Cir. 1995). More importantly, the Board's inquiry has always been limited to the existence of such a mutual understanding; where it finds one, it finds permanent replacement status without going on to inquire whether the understanding would be enforceable under state contract law. *See, e.g., Chicago Tribune Co.*, 318 NLRB 920, 924-25 (1995).

Courts have also focused on the existence, not the enforceability, of an understanding that a striker replacement's job is permanent. In *H & F Binch Co. v. NLRB*, 356 F.2d 357, 362 (2d Cir. 1972), the court stated: "Since . . . hirings [of replacements] are almost always oral and at-will, it is not necessary that [hiring] conversations should have taken a form where the 'replacement' would have a

cause of action if a striker was allowed to return to work . . . ." *Binch*, unlike this case, involved replacements who had been hired, but had not yet begun working, when the strikers sought reinstatement. However, neither the Union nor the AFL-CIO explains why an employer should have to meet a more stringent standard before replacements who have already worked for several months can be considered permanent.

Similarly, in *NLRB v. Mars Sales & Equipment Co.*, 626 F.2d 567, 573 (7th Cir. 1980), this Court described the requirement for permanent status as "a commitment *or understanding* that the job is permanent" (emphasis added), and stated that "whether the job has been permanently promised is a question of fact . . . ." This clearly implies that the critical question is the existence, not the enforceability, of such a promise, for the latter is an issue of law, not of fact.

The Supreme Court cited both *Binch* and *Mars Sales* in *Belknap*, 463 U.S. at 501 n.6, without giving any indication that it disagreed with the above-quoted language in either. This Court has not viewed *Belknap* as mandating any change in the *Mars Sales* standard for determining the permanency of striker replacements; it reiterated that standard in the post-*Belknap* case of *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1473-74 (7th Cir. 1992).

The Board also pointed out here (JA 9 n.9) that requiring an enforceable contract to establish permanent replacement status would preclude it from

fashioning a uniform national policy, since the enforceability of a contract is determined by state law, and different states have different requirements for the formation of an enforceable contract. In some states, an oral agreement that the replacements were permanent might be enforceable, while in others, the agreement would have to be in writing.[10] Similarly, some states might hold that the "at-will" language in the Company's handbook, without more, was sufficient to preclude enforcement of a contract declaring the replacements to be permanent, while others would not so hold. No language in *Belknap* supports the proposition that replacements hired under identical circumstances can be permanent in one state, for purposes of the Act, yet only temporary in another.[11]

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[10] The Board has held that oral statements to replacements may be sufficient to make them permanent. *See Chicago Tribune Co.*, 318 NLRB 920, 925-26 (1995).

[11] Contrary to the Union's contention (Br. 21 n.8), the Board cannot simply ignore state law and rely on federal law to determine whether an enforceable contract exists. "There is no federal general common law" (*Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)), and while the Board has the power to make a factual finding as to what the employer promised, it has no authority to invent a rule of federal common law to determine the legal significance of any such promise. *See Belknap*, 463 U.S. at 506. Indeed, *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001), cited by the AFL-CIO (Br. 8, 9), holds that the enforceability of an employment contract is a question of state law even when it affects the employee's rights under federal law.

The Union (Br. 16-17, 20, 23) and the AFL-CIO (Br. 5, 9) find such language in a statement in *Belknap* that federal law "insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers." The full text of the relevant passage is: "We find unacceptable the notion that . . . federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damage suits for the employer's breach of these very promises." 463 U.S. at 500. Thus, the Court said only that federal law insists on promises of permanent employment, *not* that it insists that such promises be enforceable under state law. What the Court found "unacceptable" was not the possibility that a replacement could be considered permanent for purposes of federal law, yet be unable under *state* law to recover damages for breach of contract. Rather, the Court found it unacceptable that, where state law *did* allow the recovery of damages, such recovery should be barred as a matter of *federal* law.

2. A promise of permanent employment need not be unconditional

What is clear from *Belknap* is that a promise of permanent employment need not be absolute and unconditional to make the replacements permanent. *Belknap* itself holds that "an employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board

unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee . . . ." 463 U.S. at 503. The forms signed by the replacements here (JA 40, 42) included the two foregoing conditions. However, contrary to the Union's contention (Br. 17-19, 21, 28), *Belknap* does not hold that those two conditions are the only ones that may be imposed on a replacement's tenure without making him temporary. *Belknap* itself recognized that replacements could be subject to discharge in the event of a business slowdown and still be permanent for purposes of the Act: "That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional." 463 U.S. at 504 n.8. That rationale applies, not only to the two conditions mentioned above, but to conditions such as successful completion of a probationary period, which, as shown above, pp. 17-18, is a requirement fully consistent with permanent status.

In addition, *Belknap* noted that the Board was contending that the two conditions which the Court held would not defeat a finding of permanent status were, in any event, implicit as a matter of law in any offer of employment to striker replacements. The Court said, "[i]f these implied conditions . . . do not prevent the replacements from being permanent employees, neither should express conditions which do no more than inform replacements what their legal status is in any

event." 463 U.S. at 504 n.8. The "at-will" language in the forms signed by the replacements here did no more than inform them of their legal status under the Company's pre-existing policy, as set forth in its handbook. (JA 38.) As the Board noted (JA 9), to hold that such a statement of existing policy precludes a finding that replacements are permanent would mean that an employer who previously hired on an at-will basis would have to choose between giving replacements an impermissible preference over strikers or not hiring permanent replacements at all. The Board properly declined to impose this Hobson's choice on struck employers.

The Union (Br. 23, 25-26) and the AFL-CIO (Br. 7-9) contend that the "at-will" language in the employment application forms rendered any promise of permanent employment "entirely illusory" (Union Br. 26), since it left the Company free unilaterally to terminate the replacements for any reason, including a preference for more experienced or efficient strikers. However, as *Belknap* pointed out (463 U.S. at 504 n.8), an agreement by the employer to settle a strike by reinstating strikers at the expense of replacements is no less a volitional act on the part of the employer than a unilateral decision to do the same thing. Accordingly, an employment offer expressly subject to such an agreement is no less "illusory" than one expressly or implicitly subject to the employer's unilateral decision. Nevertheless, the Supreme Court, in *Belknap*, 463 U.S. at 503, held that

an employment contract conditioned on a strike settlement agreement which the employer is always free to make would not make the replacement a temporary employee. There is no more reason for holding that "at-will" language in an employment contract would have that effect.[12]

The Union (Br. 27-28) proposes, in the alternative, that an employer using "at-will" language in an employment contract be required expressly to disclaim intent to terminate the replacement to make room for a striker, absent a Board order or settlement requiring such termination. The Board (JA 9 n.9), while recognizing that such a disclaimer would support a finding of permanent replacement status, properly rejected the contention that it is essential to such a finding. As the Board noted, and as shown above, pp. 20-22, the Board and lower

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[12] There is no merit in the Union's contention (Br. 26) that the Board's decision would allow the employer to "manipulate" the reinstatement of strikers by selecting some for recall, not only on the basis of "greater skills or work ethic, but also possibly [on the basis of] lack of fervor for the Union." The leading case on the subject of striker replacements, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346-57 (1938), squarely holds that, if there are vacancies for some but not all of the returning strikers, the employer may not use union activity as a basis for determining which ones to reinstate at once. Nothing in the Board's opinion here suggests otherwise. However, *Mackay* also specifically permits the employer to use "any one of a number of methods," including skill or ability, to determine which strikers will have to wait for the departure of replacements. 304 U.S. at 347.

courts have consistently held that no particular "magic words" are necessary to establish permanent replacement. *Belknap* does not expressly reject this entire line of cases, and cannot reasonably be read as doing so *sub silentio*.

Moreover, the Union's proposal would be unworkable in practice. It would require an employer wishing to hire permanent replacements without abandoning its existing practice of hiring at will to tell the newly hired replacements that: (1) they were permanent employees; (2) they could, however, be terminated at any time for any reason; (3) they could *not*, however, be discharged to make room for returning strikers; but (4) they *could* be discharged to make room for returning strikers pursuant to a Board order or a strike settlement agreement. Each of the last three clauses of such a statement would qualify the preceding clause. So many qualifying phrases might well make the whole employment form hopelessly confusing to replacements, many of whom are "unversed in the 'witty diversities' of labor law." *NLRB v. S.E. Nichols Co.*, 380 F.2d 438, 442 (2d Cir. 1967). The ambiguity might well preclude the enforceability of the promise, which the Union and the AFL-CIO contend is essential to permanent replacement status. *See Penn v. Ryan's Family Stake Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001) (citation omitted) ('"[A] contract is unenforceable if it is so indefinite and vague that the material provisions cannot be ascertained.'")

It also might well preclude the existence of the mutual understanding which, under Board law, is essential to a finding of permanent replacements status. *See, e.g., Hansen Bros. Enterprises*, 279 NLRB 741, 741 n.6 (1986) ("vague statements" held insufficient to establish offer of permanent employment), *enforced mem.*, 812 F.2d 1443 (D.C. Cir. 1987); *Harvey Mfg., Inc.*, 309 NLRB 465, 468 (1992) (contradiction between oral statements and documents sent replacements "an array of mixed signals;" resulting impression was "necessarily ambiguous" and precluded a finding of permanent replacement). Ultimately, the language proposed by the Union is merely a restatement of its basic position that replacements hired "at-will" can never be permanent.

The Union argues (Br. 27) that the Board's decision is faulty because it does not "make the employer 'hesitate' before resorting to . . . permanent replacement" (quoting *Belknap*, 463 U.S. at 520-21 (Blackmun, J., concurring)). However, the Board lacks "authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965). It has no more authority to compel a party to "hesitate" before using a legitimate economic weapon. The Supreme Court squarely held in *Mackay Radio* that the permanent replacement of economic strikers is a legitimate economic weapon, and it has reaffirmed that holding even

while recognizing that the use of that weapon may discourage union membership to some extent. *See American Ship Building Co. v. NLRB*, 380 U.S. at 311, 313. If the holding of *Mackay* is to be overturned, Congress or the Supreme Court, not the Board or this Court, must do so.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the petition for review should be denied.

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March 2008

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	*	
	*	No. 07-3885
Petitioner	*	
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 26-CA-20861
Respondent	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 6,698 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003. The Board further certifies, pursuant to Circuit Rule 31(e), that the PDF copy of its brief submitted to the Court as an e-mail attachment to briefs@ca7.uscourts.gov was scanned for viruses using Symantec Antivirus Corporate Edition, program version 10.0.2.2000 (3/18/2008 rev. 9), and found free of viruses.

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Dated at Washington, DC
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	*	
v.	*	
	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No.
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Respondent	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of the brief by first-class mail upon the following counsel at the addresses listed below:

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